

Law Matters: A Celebration of Two Constitutions

Reflections of Missouri Chief Justice Michael A. Wolff

As we prepare for Constitution Day each fall, a new celebration honoring our United States constitution's September 17 anniversary, we should take time to consider the miracle the founders created more than 200 years ago.

In 1787, after many heated arguments about what form the new American government would take, the delegates to the constitutional convention finished their draft of the constitution, reflecting a series of compromises that wholly pleased none of them. The new constitution was brief – a few thousand words – and its backers wrote essays known as the Federalist Papers to explain it and to sell it to the states.

During the American Revolution, it was said that the King of England would be replaced by the law as king. The constitution drafters, however, knew the law itself could be an instrument of oppression and so hoped to avoid a concentration of power in any person or group. Today, we refer to this “rule of law” as a necessary feature of our democratic system.

The new constitution entrusted sovereign power in the people and made governing an art form: the art of compromise; the art of protecting the rights of individuals and political minorities from oppression by the majority; and the art of dispersing power evenly among the branches of government to avoid the excesses of a king.

What the constitution produced was a federal republic – “federal” because it recognized the sovereignty and power of the states over all matters not otherwise assigned to the central government, and “republic” because it distributed power among three coequal branches of government: a legislative branch to write laws; an executive branch to carry them out; and a judicial branch to resolve disputes and to ensure that the laws do not disturb the sovereign power of the people as expressed in their constitution.

While many can claim great knowledge of the U.S. Constitution, few people can claim even to have read the entire Missouri Constitution. At about 65,000 words, the state constitution certainly weighs more than its federal counterpart, which now contains about 7,500 words. And in the way that it affects our daily lives and the conduct of our civic affairs, Missouri's constitution has its own unique and important place in our democratic system of government that the founders envisioned.

While the American government still is using its first constitution, Missouri is on its fourth version. The first – created in 1820, a year before our statehood – lasted until the end of the Civil War. Missourians later adopted new constitutions following constitutional conventions in 1865, 1875, and 1943 to 1944.

The U.S. Constitution was adopted after ratification by state legislatures. It also is amended by this method of indirect democracy – approval by the people's elected representatives. Amendments to the U.S. Constitution are initiated by a two-thirds vote in each house of Congress and are ratified by the legislatures of three-fourths of the states. The fact that in 218 years, only 27 amendments have been adopted – including

the first 10 amendments, known as the Bill of Rights – shows the difficulty of amending the U.S. Constitution.

Missouri's constitution, by contrast, is a product of direct democracy. Once Missouri became a state, its constitutions have been drafted during constitutional conventions and adopted by a vote of the people. Since its adoption in 1945, the current constitution has been amended more than 200 times – each time by popular vote following either referral by the legislature or a petition by voters to place a proposal on the ballot.

Despite their striking differences, the state and federal constitutions share much in common. Each is designed to establish the institutions of government ... and to protect its citizens from government abuses. Each structures government with an executive branch headed by a chief executive, a legislative branch consisting of two bodies and a judicial branch. Each also offers similar guarantees to citizens, including the rights of due process and equal protection of the law.

The federal constitution empowers states to shape their own constitutions, as long as states do not limit rights the U.S. Constitution guarantees to citizens or otherwise violate the U.S. Constitution. As a result, in nearly every respect, the Missouri Constitution is more explicit than its federal counterpart. The state constitution details the organization of local governments, from counties and cities to school districts to sewer districts, and its taxation provisions are highly detailed. Missouri also goes further in its guarantees to its citizens. For example, Missouri's constitution guarantees certain rights to crime victims; the federal constitution does not.

Much of what the federal government does today results from the federal government's varying and expansive readings over time of the relatively brief provisions of the U.S. Constitution. Remember, however, that when this document was written in 1787, the founders could not possibly envision our modern society with its cars and computers and commerce.

On the other hand, most changes in Missouri's constitutional interpretation have occurred not by government action but rather by the people's votes on explicit amendments to make their constitution grow to keep up with the needs of modern society. For instance, the Missouri Constitution forbade gaming until the 1990s, when it was changed – not by legislators or judges, but by voters in popular elections. Missouri's constitution ultimately is controlled directly by the votes of its people. As noted earlier, the same is not true at the federal level.

Federal law now mandates that we study the U.S. Constitution in observance of Constitution Day. But let us not forget the importance of the Missouri Constitution as well. Both constitutions are worthy of study and celebration.



Law Matters: Why the Rule of Law?

Reflections of Missouri Chief Justice Michael A. Wolff

Political leaders, pundits and civic teachers talk frequently about “the rule of law.” And we who listen nod our heads and think, “I agree with that.” We all have some notion that the rule of law is central to our democratic system, but why is that so?

I recently have had the privilege of talking with lawyers and judges from around the state and have had the opportunity to reflect on why this concept is so central to our American idea of democracy. I’d like to share those thoughts with you.

We are a nation first and foremost of laws. We have no common national origin or ethnicity that currently forms our shared identity as Americans. Instead, our identity has been forged by the rule of law and by our common experience that faithfulness to the law guarantees liberty, equality of opportunity and a functioning civil society even in the face of those who, through ambition for power or wealth, would seek to impose their will on the less powerful. But to understand the “rule of law” and why we have it more completely, we need to look back into our history as a nation.

The signers of the Declaration of Independence understood the oppression that occurs when those in power control the law for their own purposes. The signers understood that it was necessary to have a stable justice system – to have rules and laws based on certain fundamental principles and not the arbitrary whims of those holding government power at any moment. Only in this way could we protect ourselves from tyranny.

We all remember learning about “Life, Liberty, and the Pursuit of Happiness,” the most memorable phrase of the Declaration of Independence. It has been not only part of our civics or social studies classes but also part of the popular culture. For some, school lessons might not have done the trick, but many remember television shows such as ABC’s Saturday morning cartoon show, “Schoolhouse Rock.” Those cartoons taught us the meaning of the Declaration of Independence: “if a government won’t give you your basic rights, you better get another government;” that our constitution is a “list of principles for keeping people free;” that, in the preamble to the constitution, our Founding Fathers set out “to form a more perfect union” and “establish justice.” “Schoolhouse Rock” showed us, as well, that in the three-ring circus known as our government (remember, this was for children), the courts in “ring three ... take the law and ... tame the crimes, balancing the wrongs with your rights” and that, through the system of checks and balances, “no one part can be more powerful than any other is.” Our school lessons and popular culture show us that the Declaration of

Independence and the Constitution reflect a profound feeling for due process – for fair and impartial application of the law – that is part of the American soul. This feeling is embodied in the Constitution’s Bill of Rights and, following the Civil War, by the Fourteenth Amendment’s guarantee that no state should deprive any person of due process or equal protection of the law.

To be a bit more specific, we might consider some of the grievances listed in 1776 in the Declaration of Independence against King George III, who deprived us “in many cases, of the benefits of trial by jury” and transported us “beyond seas, to be tried for pretended offenses. ... [H]e ... obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He ... made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Our founders were wary of the tyranny not only of a king but also of political majorities. They realized in creating our constitution

that a government system needs checks and balances to ensure that the most fundamental principle of our nation – the law – would be protected for the generations to follow. The varying factions should be kept in check, as one of the Founding Fathers, James Madison, argued in Federalist Paper No. 10, so that no particular group in society or any branch of government should hold limitless power. For the same reason, we have states in control of some matters and the federal government in charge of others. This is the same reason Congress consists of two bodies, with membership of the House of Representatives based on population and membership of the Senate equal to all states. The former represents the will of the majority while the latter tempers that will by reflecting the desires of all equally. The constitutions of the United States and the state of Missouri exist for the protection of all – majority and minority interests, executive and legislative branches, state and federal governments – with the judiciary serving as arbiter of disputes between factions and the instruments of government.

This concept of checks and balances is, I believe, engrained in the souls of the American people. Our system of checks and balances, needed to protect basic human liberties, has been with us since the start of the republic. Another of our founders, Alexander Hamilton, noted in Federalist 78 that “the complete independence of the courts of justice is peculiarly essential in a limited Constitution.” If certain rights are reserved for the people, or even to the states, then who is supposed to preserve those rights? Are we just to hope that the legislative and executive branches don’t enact laws that infringe on those reserved rights and that they will simply choose not to adopt such laws? Politicians occasionally suggest that is so, but Alexander Hamilton certainly didn’t agree. And, lest we think Alexander Hamilton was proposing something akin to “judicial tyranny,” he disabuses us of that notion as well, stating: “this conclusion does not suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both” and, if a statute stands in opposition to the constitution, then “the judges ought to be governed by the latter rather than the former.”

In Missouri, where judges stand for retention or for election by the people, the duty is as clear as it is occasionally difficult: In each individual case, judges are accountable to the law and not to the popular will.

Adherence to the rule of law helps to preserve the rights of all people in a democratic society; the operative words being “the rights of ALL people.” As reflected in our Declaration of Independence, in the Preamble to our Constitution, and in the immortal words of Abraham Lincoln at Gettysburg: in the United States, the power of government comes from all people, not from those in positions of power or those who control a majority of government posts.

The rule of law is what makes our nation so different, so resilient and so free. The human capacity for justice makes democracy possible, as the theologian Reinhold Niebuhr noted years ago. But the human inclination to do injustice to others makes democracy – and the rule of law – necessary.



Law Matters: How We Choose Missouri Judges

Reflections of Missouri Chief Justice Michael A. Wolff

If you were to write a constitution to set up a system of courts, how would you select the judges?

The writers of Missouri's first constitution set up a court system in which the governor appointed judges who were subject to confirmation by a majority vote of the state senate and then served for life. In doing so, they copied the United States constitution's method for appointing federal judges.

But Missouri's 1820 constitutional writers added another provision not found in the federal system: Rather than allowing a judge to be removed by impeachment, which is provided for in the federal constitution, the Missouri constitution provided that a judge could be removed from office by a vote of two-thirds of the members of each house of the general assembly.

This system lasted about 30 years. During the 1830s and 1840s, people in various parts of the country opposed the so-called "elites" whom governors appointed. These populists urged for the direct election – by the people – of their judges. Probably more to the point, many lawyers of the era believed that the popular election of judges would enhance their legitimacy because then they would be answerable to the people. These beliefs influenced Missouri voters, who in 1848 changed the state's constitution to require judges to be elected rather than appointed. The first judges were elected under this new system in 1850.

Popular election of judges in Missouri continues to this day in 110 of the state's 114 counties, which constitute 40 of the state's 45 judicial circuits. Voters choose these courts' judges in popular elections in which judges and judicial candidates alike are designated by their political party affiliation. This system seems well-suited for the rural areas of Missouri, which are small enough so that campaigns are not especially expensive and the voters can get to know the judges and judicial candidates before they cast their votes.

This type of system has not fared well, however, in other states that continue to elect all their judges – including those on the state's highest court – in contested political elections. A growing number of these states – including our neighbor, Illinois – have witnessed high-dollar campaigns for their Supreme Court judicial races. These campaigns frequently top the \$1 million mark per candidate and have become notorious for their scathing television ads of increasing nastiness. Just last fall, more than \$10 million was spent on a two-way race for one geographic district seat on the Illinois Supreme Court, making it the most expensive judicial campaign in American history. Money from these campaigns comes not from large numbers of individual citizens but rather from special interest groups. In those states, one candidate might be backed by the lawyers who bring personal injury lawsuits, and other candidates may be supported financially by business interests and insurance companies. The effect of this kind of campaigning has been to diminish the public's trust and confidence in those judges who are elected.

In Missouri, problems with partisan elections developed in the 1920s and 1930s. During those years, judges on the Supreme Court, the three geographic districts of the Court of Appeals, and two metropolitan trial courts were selected in elections in which nominees were chosen by political parties under a patronage system. This patronage system rewarded judicial candidates for their faithfulness to the political party and not necessarily for their competence or experience. As a result, the public suffered. In St. Louis, a person without any legal training or experience was elected to become a judge, and through the rest of the state, Kansas City's notorious "Boss" Tom Pendergast hand-picked judges for the benefit of his powerful political machine rather than for

the best interest of the people. Judges were plagued by outside political influences, and dockets were congested due to the time the judges spent making political appearances and campaigning.

By 1940, Missourians had endured enough political corruption in judicial selection. A group of citizens, business and civic leaders, and lawyers – intent on reforming judicial selection in the state – successfully placed on the ballot an initiative petition to limit the influence of politics on the selection of judges on the Supreme Court, the Court of Appeals and the trial courts in Jackson County and St. Louis city by establishing the Missouri Nonpartisan Court Plan. During the November 1940 election, voters statewide adopted the nonpartisan plan with nearly 55 percent of the vote. Acting under a local option provision in the constitution, voters in Clay, Platte and St. Louis counties later adopted the nonpartisan court plan for their trial judges.

Under the nonpartisan court plan, any person who meets certain constitutional requirements may apply for a judicial vacancy. From that pool of applicants, a commission consisting of citizens, attorneys and a judge selects three candidates for the judicial vacancy. The commission forwards these candidates' names to the governor, who then selects a judge from among the three candidates. After the judge has served on the bench for at least a year, the judge stands for retention by the voters at the next general election. A simple majority of "yes" votes suffices to keep the judge in office for a full term. Unlike judges in the federal system, judges in Missouri do not serve for life. Regardless of whether they are elected or selected under the nonpartisan court plan, a judge serves only a specified term of years, which varies from four years to 12 years depending on the level of the court on which the judge sits. In addition, the Missouri constitution requires all state judges to retire at age 70.

Under any system of judicial selection, it takes some effort to get to know a judicial candidate. This is true whether the judge is running for election or standing for retention by the voters. In the retention election, The Missouri Bar for years has attempted to fill this information gap by surveying lawyers who appear before the judges who are on the ballot. The judges are rated on a number of factors – including knowledge of the law, courtesy and judicial temperament – and the results of the survey are publicized widely.

This unique judicial selection and retention method – first developed more than 65 years ago in Missouri – has been adopted, in some form, in more than 30 states for its virtues, including the screening of candidates for their qualifications. Its eradication of partisan contested elections for the judicial offices to which it applies also eliminates the need to raise money, seek political endorsements, and conduct regional or statewide campaigns for partisan contested elections.

Regardless of the manner in which they are selected for office, however, all Missouri state judges remain accountable to the voters through the electoral process, be it through a partisan ballot or a retention ballot. In the nonpartisan plan's 65-year history in Missouri, only two judges have been turned out of office in trial courts and none in the appellate courts. Similarly, judges in contested electoral contests rarely are voted out of office.

Since the inception of the Missouri nonpartisan plan, our blended system of selecting and retaining judges has provided for a remarkable degree of stability in the courts. All of us who serve as judges of the state courts hope this reflects a high degree of popular satisfaction with the fairness, impartiality and ability of our court system to decide disputes independently of the influences of partisan politics or the narrow concerns of special interest groups.

Law Matters: Missouri Judges Are Accountable ... to the Law

Reflections of Missouri Chief Justice Michael A. Wolff



When courts make decisions, about half the persons involved will be disappointed, or perhaps even angry, because they lost or did not win as much as they had hoped. In high-profile cases, some of the public may share that anger or disappointment. Protecting parties – and the public – from such disappointment is not the role of the courts, however, as in every dispute a court must decide, someone inevitably will be unhappy with the decision. So how are courts – and their judges – held accountable?

Federal judges are appointed for life; they are accountable to the law and to what the U.S. Constitution calls “good behavior.” All Missouri state judges, by contrast, face the voters periodically in elections. Missouri judges are accountable, therefore, both to the law and to the people.

Most of Missouri’s judges – those who serve in the trial courts in all but four of Missouri’s counties and the city of St. Louis – are elected directly by the people. Judges in St. Louis, certain urban counties and the appellate courts serve under the Missouri Nonpartisan Court Plan. Although the governor initially appoints these judges from a panel of applicants selected by a nonpartisan commission of citizens, attorneys and a judge, they are subject to a retention vote after serving one year in office and periodically afterward, ranging from six to 12 years. So, even those judges who are appointed remain accountable to the people through elections.

One of the hallmarks of the American judicial system – and of any good judicial system – is judicial accountability. Accountability prevents corruption and abuses of power; it also helps to ensure that governmental policy reflects the community’s values and interests in ensuring everyone a day in court, in protecting individual rights and, perhaps most importantly, in a stable rule of law that is free from undue influence by politicians and special interests.

Judges are accountable to uphold the rule of law through their decisions. This means that, just as juries are asked to set aside their personal beliefs and decide a case based only on the law and the evidence, judges also must set aside their personal feelings, beliefs and attitudes and decide each case according to the facts and law in that case.

Accountability to the law sometimes comes at a high price – a judge must follow the law even when doing so would be extremely unpopular. A good example of this is Judge James Horton, of Athens, Alabama, who presided over the second trial of Haywood Patterson, one of the nine young black men – known as the Scottsboro Boys – accused of raping two white women on an Alabama train in 1931.

From the beginning, the Scottsboro Boys’ trials were overshadowed by racial prejudice. The National Guard had to be summoned to prevent the Scottsboro Boys from being lynched before the trial even could be held. Patterson’s first trial yielded a quick guilty verdict and death sentence. The United States Supreme Court threw out his conviction, however, because he had not received effective counsel.

Patterson’s second trial was held in Judge Horton’s court in 1933. As in the first trial, the physical evidence and the eyewitness testimony did not support the testimony of the first alleged victim, Victoria Price. The second alleged victim, Ruby Bates, testified that she was not raped by any of the boys and that the two women, who apparently had crossed state lines for illicit purposes, had made up the charges when the train was stopped so they would not get in trouble. Despite all of the inconsistencies and evidence supporting Patterson’s defense, the

jury again found Patterson guilty and sentenced him to death. After hearing the evidence and the inconsistencies in Victoria Price’s story, Judge Horton became convinced that – under the law – Patterson could not be found guilty. Judicial doctrine requires that any verdict that is contrary to the evidence must be set aside. So when the defense filed a motion for a new trial, Judge Horton knew what he must do. He announced that he was setting aside the jury verdict and granting Patterson a new trial in accordance with judicial doctrine.

Because of the popular support for convicting the Scottsboro Boys regardless of what the evidence showed, Judge Horton also knew that this likely would be the end of his career as a judge in Alabama, and maybe even as a lawyer.

When told he should not set aside the verdict because it would be political suicide, Judge Horton is said to have responded, “What does that have to do with the case?” In granting young Patterson a new trial, Judge Horton said that he had tried to live by his family motto: “Let justice be done though the Heavens may fall,” a quote thought to have originated with the 18th century English jurist, Lord Mansfield.

The heavens did not fall, but Judge Horton lost his bid for reelection in 1934, even though, in his previous election in 1928, no one had run against him. Judge Horton later said that, despite the personal costs, setting aside the Patterson verdict was the right thing to do.

Judge Horton was a product of his time – he believed that racial segregation was proper. But he also knew that Haywood Patterson was innocent and believed he should not be convicted, on legally insufficient evidence, simply because of his race.

He also knew – although this evidence never was presented to a jury – that medical evidence proved the women had not been raped by anyone. Judge Horton had been sought out by Dr. John Lynch, who had examined the two women shortly after they got off the train and who strongly believed they were lying. His examination indicated that neither of the women had been raped. When Dr. Lynch had told the women so, they laughed. Although Judge Horton encouraged him to testify, Dr. Lynch was afraid to do so; he was a young doctor and knew that if he testified for Patterson, he would have a slim chance of continuing his career in Alabama.

Judge Horton was less afraid of public sentiment, and he rightly chose to be accountable to the law. He easily could have bowed to public pressure and preserved his career by allowing the verdict to stand, hoping that the United States Supreme Court again would step in and reverse the sentence. Given the choice between doing what was politically expedient and what was right, however, Judge Horton chose to do what was right.

Each day, Missouri judges make decisions based on the law. Few are as costly or unpopular as Judge Horton’s. Sometimes decisions courts make are criticized in the media and by politicians. Despite their personal feelings, and whichever way the political winds are blowing, these judges remember that they are accountable – to the law above all else, and to the people’s interest in preserving the rule of law. Judges following this duty are not necessarily popular, but they make our society better.

Law Matters: Success of Missouri Courts Depends on Adequate Resources

Reflections of Missouri Chief Justice Michael A. Wolff

Each year, the chief justice of Missouri is honored to give a “State of the Judiciary” speech to the state legislature. This year I spoke primarily about the important values of having courts that are professional, fair and impartial, and prompt. The media focus, not surprisingly, was on my request for a modest increase in the Judiciary’s budget.

The health of the rule of law in Missouri depends on attracting highly able women and men to public service in the Judicial Branch of state government, and we need to give adequate compensation to employees who have soldiered on through five years of lean budgets.

The simple truth in Missouri is that we cannot give the level of performance that our citizens expect – and deserve – without a budget that is sufficient to allow the courts to fulfill their constitutional responsibilities.

We share the hope expressed recently by our Governor and our legislators that Missouri is emerging from the difficult fiscal times that have been so challenging for the past five years. During this time, the Judiciary has tried to manage its resources well. Today, the judicial branch receives about 1.6 percent of the state’s budget – less than the percentage of the state’s budget that we received 20 years ago. During that same period, however, our responsibilities have increased; for instance, juvenile officers have been added to our budget to relieve county governments of some of the burden of supporting local courts. In the past 10 years, as our workforce has decreased, our trial court case filings have increased 23 percent, largely involving breach of contract claims filed by businesses, landlord-tenant disputes, domestic relations cases and criminal charges.

Our state courts continue to improve technology, consolidate local court functions, maintain specialized court programs and make other efforts to be efficient. But we cannot maintain our effectiveness without retaining our well-trained clerk staff, which we increasingly are unable to do.

A visit to your local courthouse will show the effects that our recent budget restrictions have had on our clerks, who are the frontline personnel and the true face of our court system. Turnover in their ranks has reached an alarming rate, particularly in urban and suburban areas where the annual turnover rate is as high as 17 percent. Even in rural areas, where salaries are still more competitive, we experience significant turnover. Throughout the state – in both rural and urban courts –

we have seen an actual decrease in the worth of salaries as wages fail to keep pace with the cost of living. We hope the legislature will adopt the Governor’s proposed 4-percent cost-of-living increase to assist the courts in retaining many of these frontline employees who are so important to our effectiveness.

The budgetary constraints of recent years also are taking a toll on our state’s judges, who now face their sixth year without any pay increase or even a cost-of-living adjustment. In fact, Missouri is one of only four states in the nation that has not given its judges any increased compensation during this time period.

We all know that the calling to public service involves financial sacrifice. But when the gap between the private sector and public service gets too large, good people will not sacrifice their families’ financial interests to answer the call. This stagnation of judicial salaries is having a negative impact on our ability to attract the state’s best lawyers to judicial service to provide the best service to our citizens.

There now are Missouri attorneys fresh out of law school who are paid more in their very first legal jobs than some state trial judges before whom they appear. For Missouri lawyers older than 36 years of age, the average salary is as much as one and a half times that of a state Supreme Court judge. While our state has attracted and retained – through increased compensation – many fine state-paid law professors, university administrators and other similarly talented public sector professionals, we have seen the opposite in the Judiciary. In recent years, some of our best jurists – including some from the Supreme Court – have moved on to much more lucrative jobs in the private sector, and the number of lawyers applying for judicial vacancies has decreased substantially.

My greatest fear is that we will lose the ability to attract enough of the state’s finest lawyers and clerks to public service in the Judiciary. The legislature has broad powers to repeal laws, but it cannot repeal the economic laws of the marketplace. Full recognition of these economic laws shows the way to ensuring the competent, impartial and well-run courts that our citizens expect and deserve.



Law Matters: What do Judges Believe ... Really?

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Hours after being sworn in, Justice Samuel Alito was asked to lift an order issued by the U.S. Court of Appeals based in St. Louis that put an execution on hold. He voted “no,” as did a majority of the U.S. Supreme Court. Media pundits immediately described this as “splitting with conservatives” and speculated widely as to what this supposedly surprising vote meant.

Did it mean that Justice Alito is against the death penalty or even that he believes that the defendant, Missouri inmate Michael Taylor, should not be put to death?

The pundits should stop and take a breath. All the vote meant was that the new justice voted not to overturn the appeals court’s decision to hold up the execution while a further appeal was to be decided.

Too often, court-watchers put an individual vote in a single case under a microscope. And a molehill becomes a mountain, to use another figure of speech.

This, too, happens even in the Show-Me State. For example, as the chief justice, I am responsible for signing hundreds of orders every year. These orders can be as mundane as granting an extension of time for a party to file a brief or can be as dire as a warrant setting an execution date. When I sign an order, I am indicating only that it is an order of the Supreme Court of Missouri, and nothing more. I may or may not personally agree with the law on which the order is based.

Opinions of the Court are based on the law

Courts and judges often say that our judicial opinions speak for themselves. An appellate court usually publishes an opinion after written and oral arguments by lawyers. An individual judge may be listed as the author of the opinion, which explains the reasons for the court’s decision.

Decisions are based on constitutional provisions, statutes, previous cases and procedural rules. Court opinions are not based on – nor do they necessarily reflect – the personal views of any judge on the court.

A simple example of the court’s role is a case a few years ago in which I wrote the opinion of the Supreme Court of Missouri. An Iowa man was arrested for driving in Missouri after his Iowa driver’s license had been revoked. One of the crimes he was convicted of in Missouri was driving after his license had been revoked “under the laws of this state.” The problem was language of the Missouri statute, as enacted by the General Assembly – it required that the driver’s license be revoked “under the laws of this state.” It did not include a license revoked under the laws of Iowa or any other state. When reviewing this conviction, all of the judges of course

understood that the General Assembly undoubtedly did not want drivers whose licenses had been revoked in other states to drive on Missouri roads. Nor, of course, would we judges want that. But unfortunately, that is not what the law said.

As a result, the Court unanimously overturned the conviction.

Was that result “soft on crime?” Or “strict construction?” It was neither. The Court simply applied the words of a law to the particular facts of the case. The General Assembly, by the way, fixed the law during its next session.

Court opinions are not personal beliefs

Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge’s personal views about the subject matter, nor are they pronouncements of political policy. A review of the Court’s opinions would show that decisions are based on laws enacted by the General Assembly, previous court decisions, court rules, constitutional provisions or other guiding legal authority. Different judges may differ on what a legal provision means or what legal principle controls a case. An individual judge may write a separate opinion dissenting or concurring with the opinion of the Court; there you may find an expression of one judge’s individual views about what a legal provision means or what legal principle should control.

There is no doubt that politicians or special interest groups occasionally will try to pressure courts to reach a result in line with their views. But the public has a right to expect that judges will resist such pressures. Political attacks, letter writing, phone calls or picketing the courthouse do not change the law.

In Missouri, the General Assembly changes the law. Or, if it is a state constitutional provision, the people can vote to change it. Or, if the result is based on the U.S. Constitution or federal law, the losing party can ask Justice Samuel Alito and his colleagues on the U.S. Supreme Court to correct the error.

Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.



Law Matters:

The Courts' Ideals Are Carved in Stone

Reflections of Missouri Chief Justice Michael A. Wolff

When we say something is chipped or carved in stone, we mean it is permanent. Words expressing our highest ideals are carved in stone on many of our nation's court buildings. The ideals expressed are timeless and permanent. The occupants of the buildings are temporary.

"Equal Justice Under Law" is carved in stone on the front of the U.S. Supreme Court building in Washington. The phrase expresses a permanent ideal – and a reminder to those who serve there that they are temporary custodians of that ideal. The phrase, by the way, was not crafted by the founding fathers or by a great lawyer but probably by the building's architect to express an ideal that would fit the space on the front of the building. That somehow seems fitting, because architects of such magnificent buildings are in the permanence business.

The Missouri Supreme Court building in Jefferson City likewise has two ancient ideals carved in stone in Latin on its front corners. Latin, of course, is a language no longer spoken, so the meanings of its words do not change with being used, as spoken languages do. Latin phrases are used because their meanings are considered fixed and permanent.

Perhaps you thought lawyers and judges use Latin to hide what they mean, but the truth is that few in the legal profession know Latin. On the rare occasions that I find Latin sayings, I find translations on the Internet.

One of the Latin sentences in stone on the front of the Missouri Supreme Court building, translated, means: "Where there is a right, there is a remedy (Ubi jus, ibi remedium)." Our building is nearly 100 years old, but the sentence is several centuries old. It expresses an ideal that is a cornerstone of English and American law.

"Where there is a right, there is a remedy" comes to us from the English common law. The ideal is echoed in article I, section 14 of the Missouri constitution, a provision mandating "That the courts of justice shall be open to every person, and

c e r t a i n
r e m e d y
afforded for
every injury
to person,
property or
character,
and that right
and justice

shall be administered without sale, denial or delay." The idea that justice shall be administered without sale, denial or delay comes to us from the Magna Carta (or "Great Charter") of English law that dates from the year 1215.

At the other corner of the Supreme Court building is the centuries-old principle, which translated, says: "To declare the law, not to make it. (Jus dicere, non dare)." Another common translation uses "speak" rather than "declare," but either way, it expresses the principle that courts are bound by the law as made by others – the legislative and executive branches of government, and the constitution.

Missouri's courts also follow common law principles, as adapted from the English common law, which are expressed in precedent cases. But laws enacted by the general assembly, and regulations of the executive branch that are authorized by those laws, trump the courts' declarations of the common law. And the commands of the state and federal constitutions trump the laws enacted by the general assembly and the regulations of the executive branch.

The courts' duty is to find, declare, apply and enforce the law. This leads us to the sentence in stone, front and center on our Missouri Supreme Court building, in plain English: "The law has honored us. May we honor it."

The words in stone are permanent. They express true and timeless values of our democratic republic, and apply to all three branches of government – legislative, executive and judicial. We who serve in government are merely temporary custodians of these ideals.



*For discussion questions for classrooms and civic groups,
please go to www.mobar.org under the Educators section.*

Law Matters:

Law Day Celebrates Our Enduring Values

Reflections of Missouri Chief Justice Michael A. Wolff

Law Day started as a competitive event during the Cold War. In 1958, President Dwight Eisenhower first proclaimed May 1 as Law Day – the date was chosen to contrast our system that embodies the rule of law with that of the Soviet bloc countries that celebrated “May Day” with militaristic parades and speeches glorifying the achievements of the Communist system.

What a difference a generation makes. The American governmental system – and the rule of law that we proudly exhibit to the world – faces no external threat. There are threats to our system, but they come from within.

“If destruction be our lot, we must ourselves be its author and finisher,” Abraham Lincoln said in an 1838 speech in Springfield, Illinois. To be specific, the young Lincoln said: “I mean the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of Courts”

Today, 168 years later, we similarly should be concerned with untoward attacks on “activist judges,” attacks that undermine the fundamental principles of separation of powers and the system of checks and balances that are central to our democratic republic.

Courts are easy targets. Courts handle hundreds of thousands of cases each year in Missouri, and across the country there are millions of cases each year. The everyday business of the courts – deciding cases involving businesses, families and criminal punishments – assures us that there is always some fodder for the disgruntled. The law of averages requires that half the people in these cases lose, and sometimes the winners may not believe they have won enough.

As products of human institutions, not all court decisions are correct, however soberly those judgments are reached. Appeals are available to help ensure that legal principles are applied properly. The court system, while not perfect, has proved remarkably self-correcting over time.

In the American model of democracy, courts are the third branch of government – the least dangerous branch, as Alexander Hamilton observed: courts possess neither the power of the sword, nor the purse, but only judgment.

When that judgment runs afoul of the public mood, courts are attacked by those who want them to be

subservient to the legislative and executive branches of government, which are supposedly the repositories of the public will. Missouri judges, however, are likewise answerable to voters through elections and retention votes.

The challenge for those who serve as judges in Missouri’s courts is to remain accountable first and foremost to the law. The popular will is not always served, but the rights of individuals to justice and liberty are.

Our values – preservation of the rule of law and the liberty that it ensures – cannot be stated too strongly. These values include the principle that courts should be fair, impartial and free of political influence, and that access to justice for all in our society should be assured. To uphold the law, courts must be strong and co-equal – not subservient – to the other branches of government.

Those who serve in the courts and in the legal profession are reminded often of the challenge of remaining committed to these values. There is a natural tendency of those in power to want their power to go unchecked. The values we enforce are permanent, and the challenges to our finely balanced system are perpetual.

Attacks on this system are occasionally distracting, and they have been with us throughout our history. They seem prevalent because talk radio and cable television channels build audiences by pushing the public’s anger buttons. Perspective must be maintained, however. That courts have preserved their essential role in our system of checks and balances is a tribute not just to those who have served in the American justice system. It also is a tribute to the broad consensus of the American people that these values that the courts uphold are worthy of support even when individual decisions seem not to be.

This underlying consensus of the American people is the foundation of the rule of law and a principal reason our republic endures. The Cold War is over, but Law Day retains its competitive context. The contending forces within the United States may be just as important as the competition of ideas that the rule of law faces in the rest of the world.



Law Matters: Promises, Promises ...

What Should a Judicial Candidate Say?

Reflections of Missouri Chief Justice Michael A. Wolff



In the vast majority of the 115 counties in Missouri, candidates for associate circuit judge and circuit judge run on partisan ballots much like candidates for legislative and executive branch offices. In Clay, Jackson, Platte and St. Louis counties, the city of St. Louis, the Court of Appeals and the Supreme Court of Missouri, judges are nominated and appointed under Missouri's nonpartisan court plan and face the voters periodically in yes-or-no retention elections.

So what do you, as a voter, want to know about the personal views of candidates running for judge?

After all, haven't we come to expect promises from candidates? We are used to candidates for legislative and executive branch offices telling us, for instance, that they believe that public schools should be permitted to conduct prayer sessions for students, or that they believe the right of individual citizens to keep and bear arms should be protected.

Campaign promises are expected because legislators set policy, and executive branch officials such as the governor carry out clear visions of their own. When voters elect people to these branches of government, the voters generally expect that the successful candidates will keep their campaign promises. Because of this, all sorts of interest groups send questionnaires to and conduct interviews of candidates to ascertain their views to decide whom to support. In fact, some interest groups spend millions of dollars supporting candidates for legislative and executive office.

Candidates for judicial office, however, are very different from those running for legislative or executive branch offices. When an issue comes before a court, do you want your case to be decided by someone who already has announced his or her position on the matter during a campaign? Or would you rather have the opportunity to present the facts, issues and law as you see them before the judge makes a decision?

When citizens are summoned to serve as jurors in our courts, they often are asked whether they can set aside their own personal views and follow the law. If they say they cannot do so, then they are not selected for jury service. We should be able to expect the same of judges, regardless of whether they were elected in partisan elections or selected under the nonpartisan court plan.

My own opinion is that candidates for judge should make only two fundamental promises:

- 1) They will decide cases fairly and impartially, free of political influence or intimidation; and
- 2) Regardless of their own personal view or the views of the voters, they will follow the law. This includes the Constitutions of the United States and the state of Missouri, and the statutes, enacted either federal or state.

Until recently, the code of judicial conduct prohibited judicial candidates from announcing their positions on issues that might be decided in the courts. The United States Supreme Court in 2002 decided, in a case from Minnesota, that such a judicial ethical rule violates the free speech clause of the First Amendment to the United States Constitution.

After this decision was issued, the Supreme Court of Missouri amended Missouri's code of judicial conduct to provide that, in effect, if a judicial candidate announces a position on an issue – which is his or her First Amendment right to do – that judge may have to recuse (or remove) himself or herself from hearing a case about that issue.

So be wary of judicial candidates who take positions on issues, because they cannot deliver on their promises. Answers to issues questionnaires or any campaign promises are not likely to tell you anything useful about how a judge will decide a case, or whether the judge will be able to sit on a case. If a candidate for judge promises, for instance, that as judge he or she will put in prison every person convicted of or pleading guilty to a felony charge, let the voters beware: This candidate has made a promise that, in all likelihood, will disqualify the candidate from sitting as a judge in felony criminal cases.

We Americans pride ourselves in the rule of law: the principle that no person – not even your local judicial candidate – is above the law. Courts provide checks and balances to the other co-equal branches of government. The rule of law means that judges do not simply follow the will of the majority or even their own personal viewpoints but rather must judge in accordance with what the Constitution and the law require.

Elections for judge are indeed different, and we as voters must approach judicial candidates differently. Instead of seeking campaign promises that a judge cannot keep if he or she is to do her job, we as citizens must undertake the task of determining each judicial candidate's character and experience.

In less populous areas especially, many voters know their candidates, either personally or by reputation. It is helpful to look at the candidates' experience, education and family, as well as civic, charitable and religious involvement. In the grand scheme of things, when it comes to the business of judging, who the candidate is seems far more important than what the candidate may say in special interest questionnaires or 30-second campaign ads.

Law Matters: Missouri Courts ... The Last Resort for Vulnerable Children

Reflections of Missouri Chief Justice Michael A. Wolff

Missouri courts deal in hundreds of thousands of cases each year that involve money, property, business dealings and crime, but no category of cases is more important than those dealing with the safety and welfare of children. The protection of our children is the highest and greatest responsibility of the courts of this state.

Court cases involving children often arise when social relations break down or are in need of repair. The broken relationships that come to court are usually the ones where the adults involved cannot or will not resolve their differences. These are difficult and emotionally taxing cases.

Last year, for instance, 110,000 cases were filed seeking dissolution of marriages. A large number of these involve dependent children. Fortunately, many of these divorcing parents are able to resolve the issues of child custody, parenting time and support by agreement. For those parents who cannot agree on these matters, the courts – circuit and associate circuit court judges – must provide an answer.

Mothers have rights, fathers have rights, and these rights often clash. Are the courts pro-mother or pro-father? The courts should be neither. The law recognizes these asserted parental rights, but one set of rights predominates – the best interest of the children involved.

After a court grants judgment dissolving a marriage, a couple is no longer husband and wife, but they both are still parents. It is often up to the courts, on a continuing basis, to ensure that they fulfill their obligations as parents. The court's role in this is not an easy one.

Some of the toughest cases involve abused and neglected children. In fiscal 2005, more than 17,000 children were, at some point in the year, under the jurisdiction of a Missouri court and in the custody of the state's Children's Division. This is an increase of 30 percent from 12 years earlier.

Numbers do not tell the whole story, however. There are many social issues that contribute to reasons that children cannot remain safely with their natural parents. These can include parental drug use or alcoholism; incarceration; or the lack of accessible

resources for families, including housing, jobs, education and mental health services.

Federal and state laws impose many requirements on, and demonstrate the need for, highly skilled and dedicated judges to hear child abuse and neglect cases. The law requires courts in these specialized cases to oversee the efforts of the child welfare system in attempting to find permanent homes for abused and neglected children in a timely manner. Court rules and state statutes set time deadlines for these cases so that children do not languish in the system without permanent placement.

To this end, Missouri's courts engage in cooperative efforts with everyone involved in the child welfare system. The Commission on Children's Justice was created to unify the three branches of government – executive, legislative and judicial – and agencies in the private sector to ensure comprehensive solutions to child welfare problems.

The judicial branch has made special efforts over the years to educate those who work with children, to improve court processes, and to use technology to the fullest to meet the goal of ensuring the safety and welfare of children.

The stakes are high. Each time, a child's well-being hangs in the balance. Each time, the outcome in the case is based on human judgment, which is fallible. Parents make mistakes, social workers make mistakes, juvenile officers make mistakes and judges make mistakes. But as one young man once told a roomful of judges, child welfare system workers and legislators, the system did not give up on him, and we should not give up on it.

Every day, we need to remind ourselves that we not only are dealing with problems facing today's children, but we also are charting a course and building a future for the next generation. Whether that course is clear and that future is bright depends on what we do today in addressing the needs of our state's young people who are made vulnerable by the failings of their families.



Law Matters – Missouri Sentencing: Crimes, Punishments and Public Safety

Reflections of Missouri Chief Justice Michael A. Wolff

“If you do the crime, you’ll do the time.” To law-abiding citizens, this catch-phrase may sound like a simple yet perfect sentencing formula. Simple in theory, but reality is . . . not so simple.

When a thief steals your car, your first emotional response may be that he should be put in prison for the rest of his life. At least that would keep him from stealing any more cars. Even if a life sentence feels, for the moment, like it fits the crime, it may not serve the traditional notions of justice or fit the public’s pocketbook.

When legislators enact laws prescribing ranges of punishments, they may take incentives into account: if stealing a car were to carry the same punishment as shooting a person, for example, wouldn’t the car thief shoot you and then take your car? The punishment would be the same. That is one reason the law establishes different ranges of punishment for different crimes.

Legislators also may consider the cost of prison versus the alternatives. There currently are more than 30,000 individuals in prison and nearly 70,000 on probation or parole. The cost of prison is \$39.13 per day per inmate, not including costs of building prisons. Intensive or community-structured supervision, including drug court supervision, costs \$6.25 per day; electronic monitoring is \$10 per day; and regular probation averages \$2.17 per day. Operating costs for prisons and correctional programs is about \$638 million per year and does not include construction costs.

Sentencing to prevent future crime

Sentencing options include prison, probation, a community-structured sentence consisting of an intensely supervised probation with strict conditions, or a “shock” probation sentence in which offenders are evaluated during the first 120 days to determine whether they should remain in prison for a longer term or be released to community supervision. The 120-day sentence can include institutional treatment, substance abuse or sex-offender evaluation.

As every parent learns about discipline, the punishment has to fit the offense. When a judge – like a parent – chooses a punishment, the judge tries to make sure that a particular offender does not repeat bad behavior. Avoiding future crimes is important because more than 97 percent of felony offenders in Missouri eventually are released from prison.

In any sentencing, a judge’s foremost concerns are justice – an elusive concept – and public safety. Violent felonies raise concern for public safety and typically draw long sentences. In less severe cases, for example, drug possession, theft or vandalism, the judge tries to set sentences that will help prevent offenders from repeating their criminal behavior.

The judge is not alone in considering justice and public safety in sentencing. Prosecutors, defense lawyers and probation officers also play roles in sentencing. And in a few cases, juries recommend sentences. Many sentences result from plea agreements between prosecutors and defense attorneys. In those cases, the judge may allow the attorneys to

agree on the sentence or on the range of punishment, but the judge is free to reject the agreement. This requires a trial or a new agreement.

Fully informed judicial discretion

Each crime carries a range of punishments that can be imposed. Some offenses carry mandatory minimum terms; for some violent offenses, the law prescribes a certain percentage of the sentence be served in prison before parole.

But in the end, within the limits of the law, the sentence is within the discretion of the trial court judge.

To support this judicial discretion in felony cases, the Missouri Sentencing Advisory Commission – working in close cooperation with the Department of Corrections, the Board of Probation and Parole, and the Missouri Judiciary – has developed a system of recommendations that includes the various options available.

These recommendations help make all who deal with sentencing – courts, prosecutors and defense counsel – as fully informed as possible of the options available for managing the offenders, the risk factors that may predict whether an offender may re-offend, and the guidelines and practices of the parole board in releasing offenders on parole.

The recommended sentences – which are based on the actual sentences for each offense – become progressively more severe depending on the offender’s prior criminal history.

Before sentencing an offender, a judge may ask for a sentencing assessment report. The report, prepared by one of the state’s 1,200 probation officers, includes the details of the offense; the impact on the victim; the offender’s prior criminal history; an evaluation of the offender’s characteristics that relate to the risk of re-offending, including education, job status and substance abuse; and a management plan for dealing with the offender, whether in prison, in a 120-day sentence for evaluation or treatment, on probation, or in some community-based alternative setting.

The commission’s information-based system, fully implemented since November 2005, continues to be evaluated. Detailed information about the commission’s composition, processes, analyses and recommendations – as well as the sentencing options and alternatives available in Missouri’s courts – is available on the commission’s Web site, www.mosac.mo.gov.

Sentencing is probably the most difficult task facing any trial judge. Trial court judges sometimes worry whether a particular sentence is the “right” one . . . whether it will make the offender do the right “time” for the crime, whether in prison or on community supervision . . . and whether the sentence ultimately will serve justice and protect the public. The information available will help the judge make better decisions in many cases, but there are no easy answers.



Law Matters: From the Three Stooges to the Three Branches – It's Back to School

Reflections of Missouri Chief Justice Michael A. Wolff



Hi ho, hi ho, it's back to school we go. In addition to the three R's (reading, writing and 'rithmetic – even though only one is really an "R" word), I would like to advocate the teaching of civics.

Why civics? Well, perhaps we should find it disturbing that a recent Zogby International survey found that more Americans can name the original Three Stooges (that's Larry, Curly and Moe, for those who had a busy, intense or culturally deprived childhood) than can name the three branches of government.

The same survey found that 87 percent of Americans knew the names of at least one of the Seven Dwarfs (I only got as far as Sneezzy, Grumpy and Doc), but only 39 percent could name one of the justices of the U.S. Supreme Court.

In our media-drenched society, where more focus seems to be placed on pop culture than on civic education, it is much easier for our citizens to know all of the judges on "American Idol" than any of the justices of the Supreme Court.

To be a well-informed and effective citizen, it is not necessary to know the names of the justices of the Supreme Court. After all, they are not like rock stars or television stars; neither Judge Judy nor Judge Joe Brown is one of them.

But it is essential for a well-informed and effective citizen to know there are three co-equal branches of government – executive, legislative and judicial – in both our state and federal governments, and to at least understand the role those Supreme Court justices serve.

Significantly, the Judicial Branch is referred to as "the least understood branch." Its well-known roles include conducting trials for those accused of crimes, setting punishment for those who are guilty of crimes, and resolving a wide variety of disputes – including contracts, marriage and child custody issues, probate, personal injuries and so forth. In these cases, courts allow people to resolve their disputes without resorting to violence. These well-accepted institutions for peacefully resolving disputes are one of the hallmarks of our civilization.

The courts' least understood role is that of protecting citizens from the overreaching of government. The genius of the American system of laws is that the three branches of government serve as checks and balances for one another. The least understood branch – the Judiciary – fulfills a vital role in upholding the rule of law in our democracy. It is worth studying.

Missouri is fortunate to have many dedicated teachers ready, willing and able to transmit these important lessons

to the next generation of citizens. To help these teachers, The Missouri Bar has become the hub of some very strong law-related education programs, including an annual civic-education conference for schools. It also has excellent instructional resources, including lesson plans for a variety of programs and a free video-lending library for teachers, available through the Bar's Web site, www.mobar.org. Missouri's judges and lawyers across the state have been volunteering to bring instruction and programs about law and the legal system to our state's classrooms.

Congress recently mandated that schools teach about the United States Constitution on Constitution Day, September 18. Much has been written about the "no child left behind law" that tests students in a variety of subjects. Civics, the study of our government – knowledge necessary for us to be good citizens – is not among the subjects covered. Perhaps that is why – according to another recent survey – that only half of our young people believe it is even necessary to pay attention to politics and government to be a good citizen.

No single program can divert our nation's attention from its infatuation with celebrities and pop culture, and one day of focus on civic education will not be enough, but it's a start. Last year was the first year the Constitution Day requirement was in effect. Many Missouri judges and lawyers took that opportunity to help schools meet the Constitution Day requirement. I hope their efforts will be renewed and perhaps even expanded.

Reading, writing and arithmetic are essential for young people to learn to function in our society's economic system. Similarly, a basic understanding of civics is essential for them to function effectively as citizens in our democratic republic.

"Our Constitution is neither a self-actuating nor a self-correcting document," Richard Beeman, professor and dean at the University of Pennsylvania, said. "It requires the constant attention and devotion of all citizens."

Just as children should not be left behind, neither should the constitution be left behind . . . nor misunderstood. All of us – regardless of whether we are back in school this fall – should take an active interest in learning about and striving to understand our system of government. The future of our republic depends on it.